84-621

No. 84-

Office-Supreme Court, U.S.
FILED
OCT 17 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

and

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Petitioners,

v.

THE UNITED STATES OF AMERICA

and

THE INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOSEPH AUERBACH
(Counsel of Record)
MORRIS RAKER
HARVEY E. BINES
MARGARET H. RAYMOND
SULLIVAN & WORCESTER
One Post Office Square
Boston, MA 02109
(617) 338-2800

ROBERT E. ZIMMERMAN
ROBERT K. DREILING
114 W. Eleventh Street
Kansas City, MO 64105
(816) 556-0410
Attorneys for Petitioners

Of Counsel:
DAVID M. SCHWARTZ
SULLIVAN & WORCESTER
1025 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 775-8190

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED FOR REVIEW

1. Should the Interstate Commerce Commission, faced with the largest transportation merger in its history, and ordered by statute to maximize competition, consider imposing merger conditions which introduce rail competition into vital, but closed, rail markets as the public-interest price for the private benefits of the merger?

2. Did the Interstate Commerce Commission approve a rail merger where only three of six commissioners voted their unqualified approval of the transactions?

3. May a court of appeals, faced with a public-interest determination in a complex administrative case, abandon the substantial evidence standard of review?

LIST OF PARTIES

Eight petitions for review of an order of the Interstate Commerce Commission were consolidated in the Court of Appeals. The parties* involved in each of these petitions are as follows:

1. No. 82-2253: SP, Petitioners; DRGW, ATSF, UP and CNW, Intervenors.
2. No. 82-2323: DRGW, Petitioner; CNW, Intervenor.
3. No. 82-2342: Edward K. Wheeler, Petitioner; CNW, Intervenor.
4. No. 82-2370: KCS, Petitioner; CNW, UP, DRGW, ATSF, and SP, Intervenors.
5. No. 82-2418: Brotherhood of Maintenance of Way Employes, Brotherhood of Railway Signalmen, Brotherhood of Railway & Airline Clerks, Inter-

---

* The following abbreviations will be used for participants in the proceedings below and other entities:

ATSF	Atchison, Topeka & Santa Fe Railroad Company
CNW	Chicago & North Western Transportation Company
Conrail	Consolidated Rail Corporation
DRGW	Denver & Rio Grande Western Railroad Company
KCS	The Kansas City Southern Railway Company and its wholly owned subsidiary, Louisiana & Arkansas Railway Company
MP	Missouri Pacific Corporation and Missouri Pacific Railroad Company
NS	Norfolk Southern Corporation
SP	Southern Pacific Transportation Company and St. Louis Southwestern Railway Company
UPC	Union Pacific Corporation, and its subsidiaries, Pacific Rail System, Inc. and Union Pacific Railroad Company
UP	UPC and other merger parties, MP and WP
WP	Western Pacific Railroad Company

national Association of Machinists & Aerospace Workers, and United Transportation Union, Petitioners; UP and CNW, Intervenors.

6. Nos. 82-2371 and 82-2430: ATSF, Petitioner; UP and DRGW, Intervenors. (CNW also intervened in No. 82-2371).

7. No. 82-2479: American Train Dispatchers Association, Petitioner; CNW, Intervenor.

The Interstate Commerce Commission and the United States of America were respondents in each of these separately-docketed petitions for review.

LIST OF PARENTS, SUBSIDIARIES AND AFFILIATES

Kansas City Southern Industries, Inc. is the parent corporation of petitioner The Kansas City Southern Railway Company. The parent corporation of Louisiana & Arkansas Railway Company is The Kansas City Southern Railway Company.

Joplin Union Depot Company and Kansas City Terminal Railway Company are subsidiaries (other than wholly owned subsidiaries) of petitioner The Kansas City Southern Railway Company. Louisiana & Arkansas Railway Company has no subsidiaries that are not wholly owned by it.

The following are The Kansas City Southern Railway Company's affiliates:

Pioneer Western Corporation
Western Reserve Life Assurance Company
PW Securities, Inc.
Pioneer Western Properties Inc.
Pioneer Western Energy Corporation
Derby Oil & Gas
Derby Petroleum
D & H Well Service
Twin Hills Supply
Janus Capital Corporation
Argus Computing
Quinflex Joint Venture
Investors Acceptance Corp.
DST Systems, Inc.
DST Securities, Inc.
DST Clearing, Inc.
Wall Street Clearing
National Realty Securities, Inc.
Somerset Capital Management, Inc.
Support Resources, Inc.
Boston Financial Data Services, Inc.

Shareowner Investor Services Corporation
Investors Fiduciary Trust Company
TPA Systems, Inc.
DST Computer Services S.A.
Two Heritage Drive Realty Associates
DST Realty, Inc.
Winchester Venture
Downtown Investors
LDX Group, Inc.
Telecom Engineering
LDX Network
Mid-American Cellular Systems, Inc.
Lexitel Corporation
Direct Broadcast Satellite Corporation
International Satellite Corporation
American-Coleman Company
American-Coleman International Corporation
Rycom Instruments, Inc.
Lonestar-Kansas City Concrete Tie Company
Brighton Pharmaceuticals
L.M. Johnson Company
Martec Pharmaceutical Inc.
Martec Pharmaceutical Joint Venture
Bellview Pharmaceutical
Rockhill Pharmaceutical
Olive Pharmaceutical
Southern Development Company
Rice-Garden Corporation
Port Arthur Bulk Marine Terminal Company
Northern Farms, Inc.
Southern Group, Inc.
Carland, Inc.
Trans-Serve, Inc.
Southern Leasing
Pabtex, Inc.
Tolmak, Inc.
Landa Motor Lines
Louisiana, Arkansas & Texas Transportation Company

In addition to those listed in the foregoing paragraph, Louisiana & Arkansas Railway Company has the following affiliates:

Fort Smith and Van Buren Railway Company
Joplin Union Depot Company
The Kansas and Missouri Railway and Terminal Company
Kansas City Terminal Railway Company
The Maywood and Sugar Creek Railway Company
Kansas City Southern Transport Company, Inc.
The Arkansas Western Railway Company

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES	ii
GLOSSARY OF ABBREVIATIONS	ii
LIST OF PARENTS, SUBSIDIARIES, AFFILIATES	iv
TABLE OF CONTENTS	vii
TABLE OF AUTHORITIES	ix
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION, STATUTES AND REGULATION INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
I. THE COMMISSION'S REFUSAL TO CONSIDER PROCOMPETITIVE PUBLIC-INTEREST CONDITIONS FRUSTRATES THE CONGRESSIONAL POLICY UNDERLYING THE STAGGERS RAIL ACT OF 1980	9
II. TRADITIONAL PRINCIPLES OF DUE PROCESS AND ADMINISTRATIVE PROCEDURE HAVE BEEN VIOLATED IN THIS CASE	17
A. The Court Of Appeals Upheld A Merger Not Approved By A Majority Of Commissioners	17

TABLE OF CONTENTS—Continued

Page

B. In Conflict With Decisions Of This Court, The Court Of Appeals Has Announced A Novel "Independent Judgment" Standard Of Review For Administrative Action Far More Deferential Than The Substantial Evidence Standard 19

CONCLUSION 25

[THE APPENDIX TO THE PETITION FOR CERTIORARI IS SEPARATELY BOUND.]

TABLE OF AUTHORITIES

CASES Page

American Ship Building Co. v. NLRB, 380 U.S. 300 (1965) 20, 22
Baltimore and Ohio R. Co. v. Aberdeen & Rockfish R. Co., 393 U.S. 87 (1968) 20, 24
Bowman Transportation, Inc. v. Arkansas-Best Freight System, 419 U.S. 281 (1974) 20
Burlington Northern, Inc.—Control and Merger—St. Louis-San Francisco Railway Co., 360 I.C.C. 784 (1980) 13, 15
Burlington Truck Lines v. United States, 371 U.S. 156 (1962) 20
Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 19, 20
CSX Corp.—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc., 363 I.C.C. 518 (1980) 15
McLean Trucking Co. v. United States, 321 U.S. 67 (1944) 10
Missouri-Kansas-Texas Railroad Co. v. United States, 632 F.2d 392 (5th Cir. 1980), *cert. denied*, 451 U.S. 1017 (1981) 15
NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969) 16
Norfolk Southern Corporation—Control—Norfolk and Western Railway Company and Southern Railway Company, 366 I.C.C. 171 (1982) 11
St. Joe Paper Co. v. Atlantic Coast Line Railroad Co., 347 U.S. 298 (1954) 11
Schaffer Transportation Co. v. United States, 355 U.S. 83 (1957) 10, 16

CONSTITUTIONAL PROVISION, STATUTES, RULE AND REGULATION

Due Process Clause, U.S. Const. amend. V 2
Administrative Procedure Act, 5 U.S.C. § 706 (1982) 2, 17, 19
28 U.S.C. § 1254(1) (1982) 2
28 U.S.C. § 2321(a) (1982) 2

TABLE OF AUTHORITIES—Continued

	Page
28 U.S.C. § 2342(5) (1982)	2, 6
28 U.S.C. § 2350(a) (1982)	2
Interstate Commerce Act	
49 U.S.C. § 10101a (1982)	2, 8, 9, 10, 12, 15
49 U.S.C. § 10101a(1) (1982)	10, 12
49 U.S.C. § 10101a(2) (1982)	10, 13
49 U.S.C. § 10101a(4) (1982)	10, 13, 15
49 U.S.C. § 10101a(7) (1982)	10, 13, 14
49 U.S.C. § 10101a(13) (1982)	10, 13, 14
49 U.S.C. § 10701a (1982)	2
49 U.S.C. § 10701a(a) (1982)	13
49 U.S.C. § 10701a(b)(1) (1982)	13
49 U.S.C. § 10709 (1982)	2
49 U.S.C. § 10709(a) (1982)	13
49 U.S.C. § 11343 (Supp. IV 1980)	3
49 U.S.C. § 11344 (Supp. IV 1980)	3
49 U.S.C. § 11344(c) (Supp. IV 1980)	15, 17, 18, 19, 20, 24
Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895	9
Pub. L. No. 96-448, § 101(a)	2
Pub. L. No. 96-448, § 201(a)	2
Pub. L. No. 96-448, § 202	3
Pub. L. No. 96-448, § 228(a)-(c)	3
Pub. L. No. 96-448, § 228(e)	10
Pub. L. No. 96-448, § 710	10
Pub. L. No. 97-261, § 21(b)	3
Pub. L. No. 97-261, §§ 21(f) and (g)	3
Pub. L. No. 97-261, § 31	3
49 C.F.R. § 1111.1 (1981)	3
General Policy Statement For Merger Or Control Of At Least Two Class I Railroads	
49 C.F.R. § 1180.1 (1983)	3
49 C.F.R. § 1180.1(c)(1) (1983)	13
49 C.F.R. § 1180.1(d)(1) (1983)	12
47 Fed. Reg. 49,592 (1982)	3
49 Fed. Reg. 16,881 (1984)	11
49 Fed. Reg. 19,914 (1984)	11
D.C. Cir. R. 14(a)(1)	2

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS Page

126 Cong. Rec. 7,262 (1980) (remarks of Sen. Kassebaum) 16
126 Cong. Rec. 24,878 (1980) 9-10
H.R. Rep. No. 1035, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Ad. News 3978, 4025-38 9
Feaver, *Conrail Bidders Narrowed to 3*, The Washington Post, September 12, 1984, at D8 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-

THE KANSAS CITY SOUTHERN RAILWAY COMPANY

and

LOUISIANA & ARKANSAS RAILWAY COMPANY,
Petitioners,

v.

THE UNITED STATES OF AMERICA

and

THE INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner KCS respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on May 22, 1984.

OPINIONS BELOW

The Interstate Commerce Commission's opinion (App. 39a-615a) was served on October 20, 1982 and is published at 366 I.C.C. 459-819. The decision of the United States Court of Appeals for the District of Columbia Circuit (App. 1a-38a) is reported at 736 F.2d 708 (D.C. Cir. 1984).

JURISDICTION

The judgment of the Court of Appeals was entered on May 22, 1984. (App. 616a-620a). A petition for rehearing and suggestion for rehearing *en banc*, filed on June 25, 1984 pursuant to D.C. Cir. R. 14(a)(1) by petitioners The Kansas City Southern Railway Company and Louisiana & Arkansas Railway Company, was denied on July 20, 1984. (App. 626a-629a).[1] The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1), 2321(a), 2342(5) and 2350(a) (1982).

CONSTITUTIONAL PROVISION, STATUTES AND REGULATION INVOLVED

The following constitutional provision, statutes and regulation involved in this case appear in the Appendix:

I. The Due Process Clause, U.S. Const. amend. V (App. 630a).

II. The Administrative Procedure Act, 5 U.S.C. § 706 (1982) (App. 630a-631a).

III. The Interstate Commerce Act, 49 U.S.C. § 10101a (1982), the new Rail Transportation Policy added by the Staggers Rail Act of 1980, Pub. L. No. 96-448, § 101(a), 94 Stat. 1897 (App. 631a-632a).

IV. The Interstate Commerce Act, 49 U.S.C. § 10701a (1982), added by the Staggers Rail Act of 1980, Pub. L. No. 96-448, § 201(a), 94 Stat. 1898 (App. 633a-635a).

V. The Interstate Commerce Act, 49 U.S.C. § 10709 (1982), as amended by the Staggers Rail Act of

---

[1] The American Train Dispatchers Association filed a petition for rehearing and suggestion for rehearing *en banc* on July 6, 1984. Edward K. Wheeler filed a petition for rehearing on June 11, 1984. All of these petitions were denied on July 20, 1984. (App. 621a-625a).

1980, Pub. L. No. 96-448, § 202, 95 Stat. 1900 (App. 635a-638a).

VI. The Interstate Commerce Act, 49 U.S.C. § 11343 (Supp. IV 1980) prior to the amendment of this section on September 20, 1982 by Pub. L. No. 97-261, § 21(b), 96 Stat. 1122[2] (App. 639a-641a).

VII. The Interstate Commerce Act, 49 U.S.C. § 11344 (Supp. IV 1980), as amended by the Staggers Rail Act of 1980, Pub. L. No. 96-448, §§ 228(a)-(c), 94 Stat. 1931, but prior to its amendment on September 20, 1982 by Pub. L. No. 97-261, §§ 21 (f) and (g), 96 Stat. 1123[3] (App. 641a-644a).

VIII. General Policy Statement For Merger Or Control Of At Least Two Class I Railroads, 49 C.F.R. § 1180.1 (1983) (App. 644a-648a).[4]

STATEMENT OF THE CASE

This petition seeks review of the largest transportation merger in this nation's history. On September 15, 1980, UPC filed with the Interstate Commerce Commission pursuant to 49 U.S.C. § 11343 (Supp. IV 1980) applications seeking control of MP and WP and their rail carrier subsidiaries. Prior to merger, UPC was a transcontinental railroad which operated over right-of-way primarily in the "central corridor" of the United States west of Kansas City, Missouri. After merger, UPC controlled a rail system connecting the Pacific Northwest and northern and southern California with the Midwest, Mississippi River ports, Gulf Coast ports

---

[2] The amendment made by Pub. L. No. 97-261 became effective 60 days after September 20, 1982, *see* Pub. L. No. 97-261, § 31, *after* the decision of the Commission was rendered in this case.

[3] *See* note 2, *supra*.

[4] This section was originally numbered 49 C.F.R. § 1111.1. The redesignation occurred on November 1, 1982. 47 Fed. Reg. 49,592 (1982).

and Texas-Mexico border-crossing points, thereby obtaining access to nearly every gateway and port west of the Mississippi. 366 I.C.C. at 474 (App. 64a).

In light of the concentration of market power involved, numerous public and private parties opposed the consolidation and twenty-nine competing rail carriers filed applications seeking traffic-protective conditions to ameliorate the effects of the merger on them. *Id.* at 472 (App. 61a). KCS sought certain public-interest conditions consisting of trackage rights over MP lines in Texas, in Louisiana, and between Texas and St. Louis, an area affected by the merger.[5] *Id.* at 593 (App. 240a). KCS' proposed public-interest conditions, in contrast to the traffic-protective conditions proposed by other railroads, were designed to introduce competition into economically vital MP rail markets under monopolistic or duopolistic control.[6]

The Commission conducted hearings from March 3, 1981 to January 6, 1982. *Id.* at 472 (App. 61a). The government parties representing the public interest split on the questions of whether, and on what basis, the UPC-MP-WP merger should be approved. The Commission's Office of Special Counsel flatly opposed the merger

---

[5] KCS also sought certain limited traffic protection which was denied by the Commission. 366 I.C.C. at 593-94, 597 (App. 240a, 245a). Such denial was not appealed and is not at issue in this Petition.

[6] KCS introduced evidence at hearing which showed: (1) that the East Texas and Louisiana Gulf area was the fastest-growing industrial region in the nation; (2) that, because of the commodities involved in the local economies (chemicals, soda ash, grain, etc.), shippers in the Gulf area were heavily dependent on rail transportation; and (3) that MP enjoyed monopolistic or duopolistic control in rail markets in which KCS sought trackage rights. This evidence of the need for, and the public benefits obtainable from, KCS' proposals was uncontroverted at hearing. Moreover, shippers in the region overwhelmingly supported KCS' proposals.

on the ground that no conditions could remedy its anticompetitive consequences. *Id.* at 475 (App. 66a). The Department of Transportation deemed the merger acceptable only if a number of traffic-protective conditions were imposed to offset the extensive market power of the merged system. Brief of Department of Transportation to the Commission at 3-5 (App. 650a-652a). The Department of Justice, though not actively supporting the merger, declined to oppose it if anticompetitive effects in the central corridor were ameliorated by granting DRGW trackage rights between Pueblo, Colorado and Kansas City, Missouri. *Id.* at 475 (App. 65a-66a).[7]

On September 24, 1982, the Commission voted on the UPC-MP-WP consolidation. The Commission unanimously concluded that the merger could not be approved in the form proposed by UP. Three members of the Commission voted to approve the merger if conditioned as specified in a draft report; two members voted to approve the merger subject to the imposition of additional conditions designed to offset competitive harms; one Commissioner opposed the merger. *See* Commission Ballots (App. 656a-670a). The Commission never held another formal proceeding, but on October 20, 1982, issued a report on the basis recommended in the draft report. In addition to the three commissioners who had voted approval of the draft report, the two commissioners who had withheld approval on September 24, 1982 were shown on October 20, 1982 as "concurring" in the result. 366 I.C.C. at 645-47, 649-50 (App. 315a-318a, 321a-323a).

Assuming, despite the foregoing, that the October 20, 1982 report represents the views of a majority of the Commission, the Commission found that the merger would yield public benefits of some $47 million annually

---

[7] Before the Court of Appeals, the Department of Justice joined the Commission in arguing to uphold the decision of the Commission. The Office of Special Counsel and Department of Transportation did not participate in the appeal.

because of "service improvements, cost reductions resulting from increased operating efficiencies, enhanced competition, and a stronger financial position for the merged system". 366 I.C.C. at 489 (App. 86a). The Commission also found that the merger would result in a "significant adverse competitive effect" on rail transportation of transcontinental traffic in the central corridor and Midwest traffic, especially that moving from Omaha to the Gulf. *Id.* at 533 (App. 149a). The Commission granted certain trackage rights to DRGW, SP and Missouri-Kansas-Texas Railroad Company in order to "ameliorate" these anticompetitive effects. *Id.* at 568, 578, 580 (App. 204a-205a, 216a, 220a).

The Commission refused even to consider the public-interest conditions requested by KCS. The Commission treated KCS' evidence on the need to introduce rail competition into an area affected by the merger and the public benefits to be gained thereby as "irrelevant". *Id.* at 596 (App. 243a). According to the Commission, conditions should not, as a matter of policy, be imposed on a merger except to restore pre-existing competition lost as a result of merger. *Id.* at 562-65, 595-96 (App. 193a-198a, 241a-243a).

KCS' petition for review pursuant to 28 U.S.C. § 2342 (5) (1982), consolidated with similar petitions by other parties, was heard by the Court of Appeals for the District of Columbia.[8] KCS challenged the order of the Commission on three principal grounds. KCS contended that the Commission had disregarded the requirements of the Staggers Rail Act of 1980 when it refused even

---

[8] Petitioning railroads, including KCS, sought to stay the Commission's decision pending appeal. The Court of Appeals granted only a temporary stay on December 9, 1982. *See* Slip Op. at 12, n.5, 736 F.2d at 714-15, n.5 (App. 12a). On December 22, 1982, this Court (by Burger, C.J., sitting as Circuit Justice) denied a further stay. Southern Pacific Transp. Co. v. ICC, No. A-544; Atchison, T. & S.F. Ry. v. ICC, No. A-545; Kansas City Southern Ry. v. ICC, No. A-546.

to consider the public-interest conditions proposed by KCS. KCS further argued that, because three of the six Commissioners did not vote to approve the merger in the form described in the report, the UPC-MP-WP applications were effectively denied. Finally, KCS argued that the Commission's finding that the "public will derive benefits amounting to $47 million annually as a result of consolidation", 366 I.C.C. at 489 (App. 86a), was not supported by substantial evidence or by its subsidiary findings. Specifically, KCS showed that, because of numerous arithmetic and typographical errors, subsidiary findings based on superseded evidence, and repeated failures by the Commission to incorporate into its calculations certain of its own subsidiary findings concerning public costs, the merger would result not in net benefits to the public, but in millions of dollars of net public costs annually.

The Court of Appeals affirmed the Commission on these issues.[9] Specifically the Court of Appeals adopted the Commission's interpretation of the application of the Staggers Rail Act to public-interest conditions. Without any significant analysis of the Act, its purpose or its relevant legislative history, the Court of Appeals held that the Commission may refuse to consider conditions that enhance rail competition in economically vital areas affected by the merger. Slip. Op. at 28-29, 736 F.2d at 722 (App. 28a-29a).

The Court of Appeals did not address the absence of a majority vote in favor of the transaction described in the report. Further, the Court of Appeals made no examination of any of the errors in subsidiary findings identified by KCS, much less an analysis of the relationship between such subsidiary findings and the

---

[9] The Court of Appeals remanded for further proceedings in connection with a traffic-protective condition sought by DRGW. Slip Op. at 32-34, 38, 736 F.2d at 724-25, 727 (App. 32a-33a, 38a).

Commission's ultimate $47 million public-benefit finding. Instead, characterizing KCS' position as a mere dispute over "costing methodologies", Slip Op. at 23, 736 F.2d at 720 (App. 23a), the Court of Appeals employed, without citation of authority, an "independent judgment" standard to define its scope of review. On the sole ground that the Commission had not adopted its cost and benefit figures "wholesale" from UP, the Court of Appeals concluded that the Commission had exercised its "independent judgment", and held "[t]hat must be enough for us". Slip Op. at 24, 736 F.2d at 720 (App. 24a).[10]

REASONS FOR GRANTING THE WRIT

The new Rail Transportation Policy, 49 U.S.C. § 10101a (1982), added by the Staggers Rail Act of 1980, requires the Commission to restructure the nation's rail system to promote competition. By refusing to even consider public-interest conditions designed to increase competition over pre-merger levels in economically vital rail markets, the Commission has abdicated the role established for it by the Staggers Rail Act. The Commission's decision not to consider procompetitive public-interest conditions will result in a rail market frozen at the level of competition existing in the rail industry in 1980. Because of the importance of this new legislative scheme on the rail industry, and the impact of the Commission's refusal to use its conditioning power to enhance competition, this Court should grant certiorari.

Since the Commission did not approve the transaction described in the report by majority vote, the Court of Appeals has affirmed a decision which did not accord with traditional principles of due process and administrative procedure. The Commission's action

---

[10] KCS' petition for rehearing was denied without opinion (App. 626a-629a).

circumvents the public-interest analysis of each of its members. Sanctioning final administrative action by less than a majority vote warrants review by this Court.

By focusing merely on the purported exercise of "independent judgment" by the agency, the Court of Appeals has announced a far more deferential standard of review than any previously approved by this Court. Because this novel "independent judgment" standard represents such a departure by the Court of Appeals from administrative jurisprudence and has such serious consequences in this case and in other public-interest cases, this Court should grant certiorari.

I. THE COMMISSION'S REFUSAL TO CONSIDER PROCOMPETITIVE PUBLIC-INTEREST CONDITIONS FRUSTRATES THE CONGRESSIONAL POLICY UNDERLYING THE STAGGERS RAIL ACT OF 1980.

From 1887 to 1980, railroads in the United States were closely regulated by the Commission. *See* H.R. Rep. No. 1035, 96th Cong., 2d Sess., *reprinted in* 1980 U.S. Code Cong. & Ad. News 3978, 4025-38. The Staggers Rail Act of 1980, Pub. L. 96-448, 94 Stat. 1895 (codified as amended in various sections of 49 U.S.C.), marked a radical change of policy. In place of rigid Commission regulation, the Staggers Rail Act substituted marketplace competition, wherever possible, to control rates and services in the railroad industry.[11]

---

[11] Although ruling that the Staggers Rail Act technically did not apply to the UPC-MP-WP merger, the Commission acknowledged that it was bound to apply the new national Rail Transportation Policy, 49 U.S.C. § 10101a, because of the Commission's duty to account for future effects. 366 I.C.C. at 483-85 (App. 78a-80a). The Court of Appeals noted, without further comment, that the Commission "elected to adhere to . . . [the Act's] policies". Slip Op. at 14, 736 F.2d at 715-16 (App. 14a). The Commission was bound to implement the national Rail Transportation Policy in any event, because § 10101a controls these proceedings as a matter of law. *Compare* the draft savings clause, H.R. 7235, § 802, 126

To accomplish this objective, Congress articulated a wholly new Rail Transportation Policy, 49 U.S.C. § 10101a. Section 10101a states that "it is the policy of the United States Government":

> (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;
>
> (2) to minimize the need for Federal regulatory control over the rail transportation system[;]
> . . . .
>
> (4) to ensure the development . . . of a sound rail transportation system with effective competition among rail carriers[;]
> . . . .
>
> (7) to reduce regulatory barriers to entry into . . . the industry;
> . . . .
>
> (13) . . . to avoid undue concentrations of market power . . . .

This new Congressional statement of rail policy, like the National Transportation Policy which preceded it, "is the yardstick by which the correctness of the Commission's actions will be measured." *Schaffer Transportation Co. v. United States*, 355 U.S. 83, 87-88 (1957). *See also McLean Trucking Co. v. United States*, 321 U.S. 67, 79-80 (1944).

The Rail Transportation Policy enacted in the Staggers Rail Act represents Congress' third major attempt

---

Cong. Rec. 24,878 (1980) (covering any "application, action or proceeding") *with* the savings clause enacted, Pub. L. No. 96-448, § 228(e) (covering only "applications"). The UPC-MP-WP merger applications were filed just two weeks before the Act became effective on October 1, 1980. *See* Pub. L. No. 96-448, § 710. The savings clause was designed to protect these just-completed applications from abatement, not to insulate the merger "proceedings" from "the policy of the United States". 49 U.S.C. § 10101a.

to rationalize the national rail system. In 1920, Congress chose central planning as the means for restructuring the national rail system, and directed the Commission to develop a master merger plan. *St. Joe Paper Co. v. Atlantic Coast Line Railroad Co.*, 347 U.S. 298, 315-19 (1954) (Appendix of Frankfurter, J.). In 1940, because central planning proved ineffective, Congress substituted private merger initiative for Commission planning. *Id.* at 319. With the passage of the Staggers Rail Act in 1980, Congress has determined to rely on competition to promote rail system restructuring through privately-initiated mergers.[12]

This new policy imposes a new burden on the Commission in protecting the public interest in merger proceedings. Before 1980, the public was protected from market power abuses made possible by inadequate competition in vital rail markets by close Commission regulation of rates and services. Consequently, when the Commission restructured the national rail system through privately-initiated merger proposals, the preservation of pre-existing competition was an important, but not an essential, regulatory objective.

---

[12] The rail merger activity which Congress sought to promote has in fact occurred. In addition to the UPC-MP-WP merger, the Commission has approved the merger of NS (formerly the Norfolk and Western Railway Company and the Southern Railway Company) since the Staggers Rail Act took effect. Norfolk Southern Corporation—Control—Norfolk and Western Railway Company and Southern Railway Company, 366 I.C.C. 171 (1982). Currently pending before the Commission are the merger applications of ATSF and SP. 49 Fed. Reg. 16,881 (1984). SP and ATSF are the only transcontinental railroads operating west of the Mississippi in the southern tier. Further, the Department of Transportation is considering the bid of NS, one of the three largest eastern railroads with transcontinental connections, to buy Conrail, another of the three largest eastern railroads with transcontinental connections. Feaver, *Conrail Bidders Narrowed to 3*, The Washington Post, September 12, 1984, at D8. *See also* 49 Fed. Reg. 19,914 (1984).

Under the Staggers Rail Act, however, rates and services are to be regulated by the marketplace, and effective competition among rail carriers has become a mandatory regulatory objective. Mere preservation of existing competition, therefore, is no longer adequate. In restructuring the national rail system through privately-initiated mergers, exercise of the Commission's conditioning power to increase competition has become the essential public-interest variable.

The Commission's action in this case frustrates the "policy of the United States". 49 U.S.C. § 10101a. Although acknowledging that KCS' proposed public-interest conditions were "aimed . . . at increasing current levels of competition", 366 I.C.C. at 595 (App. 242a), the Commission nevertheless ruled KCS' proposals "irrelevant", *id.* at 596 (App. 243a), on the ground that KCS had not met a threshold test of showing that its public-interest conditions were responsive to reductions in competition caused by the merger.[13]

A refusal even to consider "increasing . . . competition", *id.* at 595 (App. 242a), cannot be reconciled with the Congressional injunction that competition is to set rail rates "to the maximum extent possible". 49 U.S.C. § 10101a(1). Furthermore, the Commission's refusal even to consider procompetitive public-interest conditions

---

[13] The restoration-of-competition test proposed by the Commission for public-interest conditions is the same test as that applied by the Commission to traffic-protective conditions. *See* 49 C.F.R. § 1180.1(d)(1) (1983) (App. 647a). Traffic-protective conditions differ from public-interest conditions, however. Traffic-protective conditions are sought by petitioning railroads to regain traffic that they would otherwise lose as a result of a merger. Public-interest conditions, in contrast, are designed to add new traffic to a petitioning railroad's lines because the public's need for competition demands that result. (For example, KCS requested rights over MP's line along the west bank of the Mississippi from New Orleans because that service area is economically vital, is highly dependent on rail transportation, and is served only by MP).

flouts "the policy of the United States . . . to minimize the need for Federal regulatory control over the rail transportation system". 49 U.S.C. § 10101a(2). Pursuant to the marketplace-oriented approach of the new Staggers Rail Act, railroads may now "establish any rate for transportation or other service" without the Commission's regulatory approval. 49 U.S.C. § 10701a (a) (1982). But, if "a rail carrier has market dominance over the transportation to which a particular rate applies", the Commission must, as in the days prior to the Staggers Rail Act, determine whether the rate is "reasonable". 49 U.S.C. § 10701a(b)(1). The Act defines "market dominance" as "an absence of effective competition". 49 U.S.C. § 10709(a) (1982). Thus, far from "maxim[izing]" competition and "minimiz[ing]" regulatory control, 49 U.S.C. §§ 10101a(1), (2), the Commission's refusal to consider public-interest conditions designed to eliminate market dominance perpetuates the federal regulation the Staggers Rail Act was fashioned to replace.

Nor does the Commission's position meet the requirements of 49 U.S.C. §§ 10101a(4), (7) and (13). The Commission is "to ensure the development . . . of a sound rail transportation system with effective competition among rail carriers". 49 U.S.C. § 10101a(4). If the Commission refuses to consider public-interest conditions of the sort KCS proposed, "effective competition" is an impossible goal in markets in which it does not presently exist. Railroads will never voluntarily surrender access to markets they control except to gain a more desirable objective. Indeed, because the rail industry enjoys an almost total barrier to entry of new competition,[14] conditioning approval of a merger on track-

[14] The Department of Justice has recognized that obtaining "trackage rights is the only feasible method of entry in developed markets in the rail industry". Burlington Northern, Inc.—Control and Merger—St. Louis-San Francisco Railway Co., 360 I.C.C. 784, 919 (1980). *See also* 49 C.F.R. § 1180.1(c)(1) (1983) (new construction is not a feasible means of entry).

age rights is the *only* practical means for the Commission to achieve effective competition in closed markets. Furthermore, instead of "reducing regulatory barriers to entry", 49 U.S.C. § 10101a(7), the Commission's policy on public-interest conditions adds one more such barrier. Finally, in preserving MP's monopolistic or duopolistic dominance in rail markets identified by KCS, the Commission's rule on public-interest conditions necessarily preserves, contrary to law, "undue concentrations of market power". 49 U.S.C. § 10101a(13).

As the sole reason for its failure to consider KCS' public-interest conditions,[15] the Commission cited Congressional policy in favor of approving privately-initiated transactions that do not harm the public. The Commission feared that this policy would be contravened if the Commission were to use merger proceedings as "vehicles for rail system restructuring" in view of the "disincentive for the [merger] parties to consummate the transaction" that might ensue. 366 I.C.C. at 564-65 (App. 196a-198a). The Court of Appeals summarily affirmed the Commission's articulation of Congressional policy, albeit with greater flair for the dramatic: "[T]he Commission is not required to act as a roving ombudsman restructuring railroads on its own in order to satisfy an individual carrier's notion of what effective competition may require." Slip Op. at 29, 736 F.2d at 722 (App. 29a).

The Commission's rationale does not withstand analysis. KCS does not suggest that procompetitive public-interest conditions are mandatory, or should be imposed regardless of whether they drain away the private benefits of a merger.[16] Moreover, the Commission's argument

---

[15] Although the Commission refers to "[s]everal considerations", 366 I.C.C. at 564 (App. 196a), each of the considerations appears to be a restatement of the same concern.

[16] The constituent railroads of the merged system enjoyed operating revenues in 1979 (the study year) totalling $3.3 billion. 366 I.C.C. at 808-10 (App. 604a-606a). KCS' conditions, if approved in

that potential merger partners will forego merger proposals out of fear of being saddled with public-interest conditions cannot be reconciled with the Congressional policy of developing a "system with effective competition among rail carriers", 49 U.S.C. § 10101a(4), or with the Commission's own history.[17]

The Court of Appeals suggests that the Commission is not a "roving ombudsman". Slip Op. at 29, 736 F.2d at 722 (App. 29a). To the contrary, the Commission's conditioning power requires it to be an "ombudsman" in railroad merger proceedings. The Commission, empowered to confer the benefits of antitrust immunity and increased market power on private petitioners, is by law the appointed protector of the "public interest". 49 U.S.C. § 11344(c) (Supp. IV 1980). To be sure, the Commission, as an administrative agency, may have discretion to define how far it will rove. But, as the central representative of the public interest, rove it must.

The national Rail Transportation Policy, 49 U.S.C. § 10101a, controls the Commission's administrative discretion. The Commission must exercise its statutorily unqualified conditioning power, *see* 49 U.S.C. § 11344(c) (Supp. IV 1980),[18] to effectuate "the policy of the United

---

their entirety, would have reduced such revenues by approximately $100 million. 366 I.C.C. at 701 (App. 413a).

[17] Prior to the Staggers Rail Act, the Commission frequently imposed other conditions having little to do with restoring competition lost as a result of a merger. *See, e.g.*, Missouri-Kansas-Texas R.R. v. United States, 632 F.2d 392, 400 (5th Cir. 1980), *cert. denied*, 451 U.S. 1017 (1981), and cases cited; CSX Corp.—Control—Chessie System, Inc. and Seaboard Coast Line Industries, Inc., 363 I.C.C. 518, 576-80 (1980); Burlington Northern, Inc.—Control and Merger—St. Louis-San Francisco Railway Co., 360 I.C.C. 784, 950-52 (1980).

[18] The Commission does not assert that it lacks power to impose public-interest conditions. Acknowledging its "broad authority to impose conditions", it holds only that *its* policy articulated above reflects the preferred interpretation of the statutory policy controlling exercise of the conditioning power. 366 I.C.C. at 562, 563 (App. 193a, 194a).

States". *See Schaffer*, 355 U.S. at 87-88. "[T]he Interstate Commerce Commission must place, to the greatest extent possible, reliance on competitive market forces in its regulation of the national railroad system". 26 Cong. Rec. 7,262 (1980) (remarks of Sen. Kassebaum, one of two floor managers of the bill in the Senate).

This case is not a matter of parochial concern to KCS and shippers in the Texas and Louisiana Gulf area. It sets the precedent for public-interest conditions in all future railroad mergers governed by the Staggers Rail Act.[19] Conditions and the circumstances in which they are imposed are especially important in light of the virtually absolute barrier to entry in rail transportation. Each railroad merger in which procompetitive public-interest conditions are foregone represents a lost opportunity in a world of diminishing opportunities.[20] The proper weight to be given the procompetitive policies underlying the Staggers Rail Act is an important federal question which has not been, but should be, decided by this Court. Accordingly, the petition for certiorari should be granted.

---

[19] The Commission concedes that, apart from this case, it has not addressed the issue of public-interest conditions. After discussing the regulatory history of the standards applicable to traffic-protective conditions, including the Commission's statement of policy, the Commission acknowledges that, "[o]ur criteria for imposing conditions to protect the public have not been set forth in a similar comprehensive fashion . . . ." 366 I.C.C. at 562 (App. 194a). Thus, the Commission's position on public-interest conditions in this case is no less than rule making by adjudication, a procedure which, though not impermissible, requires scrutiny on review, especially in light of the major impact of this new rule on future proceedings. *See, e.g.*, NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764-66 (1969).

[20] Recent merger activity has been heavy. *See* note 12, *supra*. *See also* the remarks of Vice Chairman Gilliam that the UPC-MP-WP merger will result in additional rail mergers. 366 I.C.C. at 647 (App. 318a-319a).

II. TRADITIONAL PRINCIPLES OF DUE PROCESS AND ADMINISTRATIVE PROCEDURE HAVE BEEN VIOLATED IN THIS CASE.

A. The Court of Appeals Upheld a Merger Not Approved By A Majority of Commissioners.

Fundamental to institutional action by a regulatory agency is majority rule. In this case, a majority of commissioners did not vote to approve the UPC-MP-WP transaction described in the published report. By upholding the Commission's "approval" under these circumstances, the Court of Appeals ignored traditional principles of due process and administrative procedure and violated the Administrative Procedure Act (APA), 5 U.S.C. § 706 (1982), which requires a reviewing court to "hold unlawful and set aside agency action . . . found to be . . . not in accordance with law . . . [or] in excess of statutory . . . authority, or limitations, or short of statutory rights." To the contrary, the Court of Appeals has allowed the Commission to ignore the critical public-interest determinations of individual commissioners.

Under 49 U.S.C. § 11344(c), the Commission is to authorize a railroad consolidation found to be "consistent with the public interest". If the proposed transaction does not meet the public-interest criterion, the Commission may authorize a modified transaction which would be in the public interest. *Id.* By definition, a modified transaction is different from the one proposed by the merger applicants, and from any other modified transaction which might have been considered and rejected.

The Commission's last official action on the issue of whether to approve the UPC-MP-WP merger occurred on September 24, 1982 when the last commissioners cast their written ballot on a draft opinion. The draft opinion proposed the same transaction described in the report ultimately published at 366 I.C.C. 458. Of the six ballots cast by September 24, only three—less than the requisite

majority—approved the transaction described in the published report. Chairman Taylor and Commissioner Simmons voted "to approve the draft decision subject to" the imposition of additional trackage rights to remedy anticompetitive consequences of the merger that had not been adequately addressed in the draft decision. (App. 656a, 657a-659a). Commissioner Andre voted to disapprove the merger. (App. 660a).

The Commission neither convened to discuss the UPC-MP-WP merger nor cast further written ballots after September 24, 1984.[21] Yet the votes of Commissioners Taylor and Simmons to approve a transaction entirely different from that described in the draft opinion were, without further official action by the Commission, transmuted into "concurrences" by October 1, 1982. (App. 671a-677a). *See also* 366 I.C.C. at 645-47, 649-50 (App. 315a-318a, 321a-323a).

Such a characterization of Commissioners Taylor's and Simmons' votes ignores the fundamental difference between mergers subject to different conditions. In a vote on whether a given transaction is "consistent with the public interest", 49 U.S.C. § 11344(c), a ballot cast in favor of requiring a modified transaction is not a concurrence, but is instead a statement of what additional conditions the voter believes necessary to make the transaction acceptable to the public interest.[22]

---

[21] Significantly, the published report lists the date of decision as September 24, 1982, the date the last written ballot was received. 366 I.C.C. at 462 (App. 44a).

[22] Vice Chairman Gilliam's statement that he would rather not have adjudicated the fairness of the transaction to WP minority shareholders, 366 I.C.C. at 648-49 (App. 320a-321a), is a true "concurrence". His decision on this issue, like a concurring opinion by a member of an appellate bench, has significance only as an interpretation of law. If Vice Chairman Gilliam's reasoning on the shareholder issue had been adopted, no aspect of the transaction approved would have been changed.

Under § 11344(c), a merger can be in the public interest only if, *as conditioned*, it receives a majority vote. The absurdity of a process where approval of the merger is divorced from the imposition of conditions is that it would result in the unconditioned approval of a merger, where every single commissioner agreed that conditions were required in the public interest, but no particular condition received a majority vote.

The subsequent filing of "concurring" opinions by Commissioners Taylor and Simmons on October 1, 1982 is irrelevant. Had the Commission conducted another formal vote, it is likely—or certainly possible—that one or more of the conditions desired by these commissioners would have been imposed to secure the necessary fourth vote. As matters now stand, the public can never know whether the concerns of the two "concurring" commissioners were ever addressed or allayed, or whether these commissioners mistakenly believed that they were required to concur once a merger in some form received the votes of five commissioners. The Commission's unorthodox vote-tallying method simply failed to take account of the individual commissioners' assessment of the public interest.

The Commission's voting procedure presents an important federal question which has not been, but should be, reviewed by this Court.

B. In Conflict With Decisions Of This Court, The Court Of Appeals Has Announced A Novel "Independent Judgment" Standard Of Review For Administrative Action Far More Deferential Than The Statutory Substantial Evidence Standard.

This Court has held federal courts to the scope of review dictated by the APA, 5 U.S.C. § 706. Thus, in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971), the Court explained that § 706 requires a "substantial" "searching and careful" inquiry and "a thorough, probing, in-depth review".

See also Bowman Transportation, Inc. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974). The Court has further emphasized that effective judicial review is the *only* way to ensure that, despite the deference ordinarily due agency expertise, the administrative process operates properly. Otherwise, as the Court pointed out in *Baltimore & Ohio R. Co. v. Aberdeen & Rockfish R. Co.*, 393 U.S. 87, 92 (1968):

> The requirement for administrative decisions based on substantial evidence and reasoned findings—which alone make effective judicial review possible—would become lost in the haze of so-called expertise. Administrative expertise would then be on its way to becoming " 'a monster which rules with no practical limits on its discretion' ". Burlington Truck Lines v. United States, 371 U.S. 156, 167 [(1962)].

The Court of Appeals has misapprehended and misapplied these precedents. Without citation of authority, the Court of Appeals has announced an entirely new standard for judicial review of administrative decision-making—the "independent judgment" test. With this novel test, the Court of Appeals has abandoned the "searching and careful" examination required by *Overton Park*, 401 U.S. at 416,[23] in favor of the "judicial inertia" condemned in *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318 (1965).

KCS challenged the UPC-MP-WP merger as failing to satisfy the requirement of 49 U.S.C. § 11344(c) that the merger produce a net public benefit. The Commission, however, made the ultimate finding that the merger

---

[23] The enthusiasm of the government parties before the Commission for the merger was less than unalloyed. *See* discussion, *supra*, pp. 4-5. Indeed, three of the six Commissioners thought the merger either insufficiently conditioned or wholly contrary to the public interest. In such circumstances, it is especially important for a reviewing court to assure itself that the claimed public benefits are really there.

would produce $47 million of public benefits annually. 366 I.C.C. at 489 (App. 86a). KCS renewed its challenge in the Court of Appeals, contending that the $47 million figure was contrary to the Commission's subsidiary findings and was unsupported by substantial evidence. Specifically, KCS showed that, on the face of the Commission's report, the particular dollar subsidiary findings of costs and benefits of the merger added up to far less than $47 million.[24] KCS also showed that certain important subsidiary findings on costs and benefits were based on superseded evidence and typographical and arithmetic errors. Consistent with the superficial review characteristic of the "independent judgment" standard, the Court of Appeals dismissed those errors as merely a choice of "two costing methodologies" entitled to deference. Slip Op. at 23-24, 736 F.2d at 720 (App. 23a).[25]

---

[24] KCS argued that, on the face of the report, the Commission's subsidiary findings yielded a net public cost rather than a benefit.

[25] The Court of Appeals buttressed its conclusion that the Commission's findings met the "independent judgment" test by pointing to "non-quantifiable public benefits". Slip Op. at 24, n.9, 736 F.2d at 720, n.9 (App. 24a). The existence of "non-quantifiable public benefits" is a post hoc rationalization presented by the Commission's counsel to the Court of Appeals. The only example of non-quantifiable benefits in the Commission's brief to the Court of Appeals was single-system service. Commission's Brief to the Court of Appeals at 35-36 (App. 680a-681a). The benefit of single-system service was perhaps the principal factor UP relied on in projecting traffic diversions, and thus *was* quantified. 366 I.C.C. 489, 708, 791 (line item 1) (App. 86a-87a, 425a, 575a). Even "integrated management", of apparent significance to the Court of Appeals, Slip Op. at 24, n.9, 736 F.2d at 720, n.9 (App. 24a), although chiefly a private benefit to UP, was quantified by UP at least in part. 366 I.C.C. 500 (App. 103a-104a). *See also id.* at 791 (line items 2c, 3) (App. 575a). Especially in a case tried virtually entirely on the basis of economic and quantitative evidence, with extensive litigation over the economic ramifications of the transaction, *see* Appendices E-J to the Commission's report, 366 I.C.C. at 670-817 (App. 358a-613a), where the Commission purported to

The "independent judgment" test is so insubstantial that the Court of Appeals did not even understand how the Commission arrived at its $47 million figure. According to the Court of Appeals, the $47 million figure is the sum of four subsidiary figures found by the Commission.[26] These subsidiary figures, however, are but four among numerous reported figures appearing at pages 487-501 of 366 I.C.C. (App. 84a-105a). The only virtue of the particular figures chosen by the Court of Appeals is that their sum almost reaches $47 million ($46.4 million).[27] The figures used to derive the *Commission's* $47 million finding—the subsidiary findings that the Court of Appeals was supposed to review—appear at, and *only* at, 366 I.C.C. at 791 (Appendix H, "Commission Restatement Of Economic Benefits [in] Normal Year of Consolidation Operations") (App. 575a). These subsidiary findings bear no relation to the figures cited by the Court of Appeals. Had the Court of Appeals applied the substantial evidence test mandated by the APA, it could not have failed so utterly to understand the derivation of the $47 million figure.

Ironically, the very example the Court of Appeals chose to illustrate the Commission's "independent judg-

---

arrive at very specific findings of net public benefit, 366 I.C.C. at 791 (App. 575a), the Court of Appeals' reliance on "non-quantifiable public benefits" is no more than another manifestation of the "judicial inertia" disparaged by *American Ship Building*, 380 U.S. at 318.

[26] The Court cites findings of $7.9 million in intermodal diversions, $5 million in facility consolidations, $32 million in equipment utilization and $1.5 million in administrative coordination. Slip Op. at 23, 736 F.2d at 719 (App. 23a). The $7.9 million figure is not even a finding, but merely an "estimate" submitted by UP. 366 I.C.C. at 488-89 (App. 86a).

[27] The Court of Appeals does not explain why it considered $7.9 million UP would receive from *inter*modal diversions to be a public benefit, but the $32.5 million UP would receive from *intra*modal diversions (a figure appearing in the Commission's opinion one line before, 366 I.C.C. at 488-89 (App. 86a)), not.

ment" represents the most serious arithmetic error committed by the Commission. The Court of Appeals pointed to the Commission's finding that, when UP "sought to equate the return on value of equipment saved with the value (replacement cost) for equipment required, the Commission demurred and adjusted the claimed saving downward. . . . [366 I.C.C.] at 777 (App. 559a-560a)."[28] Slip Op. at 24, 736 F.2d at 720 (App. 23a-24a). The Court of Appeals was correct that, *at page 777* (App. 559a-560a), the Commission had made the subsidiary finding that UP's savings on equipment should be adjusted downward by some $13.6 million annually. Nonetheless, because of the "independent judgment" test, the Court of Appeals failed to recognize that, *at page 791* (App. 575a), where net annual public benefits are tabulated for the "normal" year, the Commission had inexplicably failed to subtract the $13.6 million from the "equipment" entry. Thus, the $32 million reported in equipment utilization savings at line item 2h, 366 I.C.C. at 791 (App. 575a) ("$32,006[,000]"), is the identical, unadjusted amount submitted by UP for equipment utilization savings. 366 I.C.C. at 785 (line item 2g) (App. 569a) ("$32,006[,000]").[29]

In its brief, the Commission admitted to "minor mathematical or typographical errors in the Commission's charts, as charged by KCS". Commission's Brief

---

[28] To the extent a merged system can provide pre-merger levels of service with less equipment, there is a savings, deemed a public benefit. In contrast, to the extent a merged system must purchase additional equipment to service diverted traffic, there is a cost, deemed a public cost.

[29] To similar effect is the Commission's failure to tabulate the costs of additional equipment purchases. The Commission made the subsidiary finding, based on UP submissions, at page 777 (App. 559a-560a), that substantial moneys would be so expended. The Commission's tables, however, report that *no* funds will be expended in *any* year, including the normal year, for such equipment requirements. 366 I.C.C. at 786-791 (line item 2g) (App. 570a-575a).

to the Court of Appeals at 36, n.18 (App. 681a). KCS, of course, denies that the errors are minor, but the question is how the Court of Appeals knew in light of the standard of review it applied. If an apparent "exercise of independent judgment", no matter how wrong, is "enough for [a court of appeals]", Slip Op. at 24, 736 F.2d at 720 (App. 24a), then the critical ultimate finding of where lies the public interest is effectively insulated from review. *See Baltimore & Ohio R. Co.*, 393 U.S. at 92.[30]

Apart from its impact on the determination of public-interest, the adoption of an "independent judgment" test in the review of administrative actions threatens to disrupt the delicate balance mandated by this Court's decisions construing the APA. An "independent judgment" standard renders the lengthy hearings, extensive expert evidence and expense of the parties in Commission proceedings superfluous. Were such a standard to gain currency in the courts of appeals, it would have a dramatic impact on the conduct of proceedings on rail consolidation applications, as well as adjudicatory proceedings before other agencies. The application of such a standard so far departs from the usual course of proceedings as to warrant this Court's exercise of its supervisory power.

---

[30] The substantial evidence test does not require a reviewing court to correct the Commission's evidentiary errors. That is the Commission's task. Upon making necessary corrections, the Commission may conclude that there are insufficient benefits to satisfy the statutory public-interest standard. 49 U.S.C. § 11344(c). In this case, the fact that one Commissioner dissented and two of the five Commissioners who approved the merger expressed a desire to have more of its anticompetitive effects remedied, *see* 366 I.C.C. at 645-47, 649-52 (App. 315a-318a, 321a-327a), reveals that, had the Commission accurately calculated net public benefit, the merger might not have been approved at all.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

JOSEPH AUERBACH
(Counsel of Record)
MORRIS RAKER
HARVEY E. BINES
MARGARET H. RAYMOND
SULLIVAN & WORCESTER
One Post Office Square
Boston, MA 02109
(617) 338-2800

ROBERT E. ZIMMERMAN
ROBERT K. DREILING
114 W. Eleventh Street
Kansas City, MO 64105
(816) 556-0410

Attorneys for Petitioners

Of Counsel:
DAVID M. SCHWARTZ
SULLIVAN & WORCESTER
1025 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 775-8190